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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

OPPOSITION TO PETITION OF SBC COMMUNICATIONS, INC. FOR RECONSIDERATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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January 10, 1996

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SUMMARY

The Telecommunications Resellers Association ("TRA") opposes the Petition for Reconsideration ("Petition") filed by SBC Communications, Inc. ("SBC") for several reasons. First, in attacking the basic dominant/nondominant carrier classifications and regulation, SBC is attempting to seek reconsideration of matters decided years ago in another docket, not in this proceeding. Second, the Commission's decision not to revisit such issues in this proceeding was a reasonable exercise of agency discretion, and SBC's arguments to the contrary should be rejected. Third, the Commission properly found in the Order of which SBC seeks reconsideration that the existing record in this docket was sufficient and need not be supplemented. Its decision in this regard was appropriate and does not constitute grounds for granting reconsideration. Finally, the issues SBC seeks to have the Commission address on reconsideration already are under consideration in the *LEC Price Caps Performance Review -- Pricing Flexibility* proceeding; therefore, there is no need for the Commission to grant SBC's Petition for Reconsideration to consider those same issues in this proceeding. For these reasons, SBC's Petition should be dismissed.

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The Telecommunications Resellers Association ("TRA"), through its undersigned counsel, and pursuant to Sections 1.4(b)(2) and 1.429(f) of the Commission's Rules, 47 C.F.R. §§ 1.4(b)(1), 1.429(f), hereby submits its Opposition to the Petition of SBC Communications, Inc. ("SBC"), for Reconsideration ("Petition") of the Order in this proceeding released September 27, 1995, FCC 95-399 (the "Order"). For the reasons set forth below, the Commission should deny SBC's Petition.

I.

INTRODUCTION

A. Procedural Background.

The series of Commission decisions that led to the filing of SBC's Petition stretches back more than 15 years, beginning with the Notice of Inquiry and Proposed Rulemaking in Policy and Rules Concerning Rates for Competitive Common Carrier Services, CC Docket No. 79-252, 77 F.C.C.2d 308 (1989) (the "Competitive Carrier Services proceeding"), in which

the Commission created the distinction between dominant and nondominant carriers and classified all carriers as either dominant or nondominant.[1/]

A few aspects of the regulatory treatment of nondominant carriers developed by the Commission in the Competitive Carrier Services proceeding have been invalidated by the courts. For example, the U.S. Court of Appeals vacated the Commission's decision in the Sixth Report and Order in Competitive Carrier Services[2/] to prohibit nondominant common carriers from filing tariffs.[3/] The Court held that the tariff filing requirement of Section 203(a) of the Communications Act of 1934 (the "Act"), 47 U.S.C. §203(a), was mandatory and that Section 203(b) of the Act gave the Commission only limited authority to modify the filing requirement.[4/] The Court did *not* invalidate the Commission's distinction between dominant and nondominant carriers, its decision as to the carriers that would be classified as dominant and those that would be nondominant, or its different regulatory treatment of such carriers, other than mandatory detariffing of nondominant carriers' services.

In the wake of the Court's decision in MCI v. FCC,[5/] nondominant carriers remained subject to the earlier orders in the Competitive Carrier Services proceeding, including the Fourth Report and Order,[6/] pursuant to which nondominant common carriers were permitted, but not required, not to tariff their common carrier services. When AT&T filed a complaint

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1/ Competitive Carrier Services, First Report and Order, 85 F.C.C.2d 1, 10 (1980).

2/ 99 F.C.C.2d 1020 (1985).

3/ MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186 (D.C. Cir. 1985) ("MCI v. FCC").

4/ MCI v. FCC, *supra*, note 3, 765 F.2d at 1192.

5/ *Supra*, note 3.

6/ 95 F.C.C.2d 554 (1983).

with the Commission challenging MCI's failure to file tariffs pursuant to the permissive detariffing policy, the Commission rejected the complaint,[7/] but initiated a rulemaking proceeding to evaluate the lawfulness of its forbearance policies for nondominant carriers.[8/]

AT&T petitioned for review of the Commission's action on its complaint, and the Court of Appeals struck down the policy of permissive detariffing as "plainly contrary to" Section 203 of the Act,[9/] under the same rationale employed in MCI v. FCC.[10/] Shortly thereafter, the Commission released a Report and Order in CC Docket No. 92-13, concluding that it had the authority under Section 203 to permit nondominant carriers not to file tariffs.[11/] AT&T filed a motion for summary reversal by the Court of Appeals, which the Court granted, reaffirming that permissive detariffing violated Section 203(a) of the Act.[12/] The appellate court's decision was affirmed by the Supreme Court.[13/]

7/ AT&T Communications v. MCI Telecommunications Corp., 7 F.C.C. Rcd. 807 (1992).

8/ Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 804 (1992).

9/ American Tel. & Tel. Co. v. FCC, 978 F.2d 727, 729 (D.C. Cir. 1992) ("AT&T"), *cert. denied*, MCI Telecommunications Corp. v. AT&T, 509 U.S. __, 113 S.Ct. 3020 (1993) ("MCI"). Again, the Court of Appeals let stand the Commission's distinction between dominant and nondominant carriers, its decision as to the carriers that would be classified as dominant and those that would be nondominant, and its different regulatory treatment of such carriers, except permissive detariffing for nondominant carriers.

10/ *Supra*, note 3.

11/ Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, 7 F.C.C. Rcd. 8072 (1992).

12/ American Tel. & Tel Co. v. FCC, Nos. 92-1628, 920-1666 (D.C. Cir. 1993) (*per curiam*), *cert granted*, MCI Telecommunications Corp. v. American Tel & Tel. Co., __ U.S. __, 114 S.Ct. 543 (1993).

13/ MCI Telecommunications Corp. v. American Tel & Tel. Co., __ U.S. __, 114 S. Ct. 2223 (1994) ("MCI v. AT&T").

In response to these judicial decisions, the Commission issued a Notice of Proposed Rulemaking in this docket (the "Nondominant Filing NPRM"),[14/] in which it proposed streamlined tariff filing requirements for domestic nondominant carriers that had previously been subject to forbearance.

In its Nondominant Filing Order,[15/] the Commission announced new streamlined tariffing requirements for nondominant carriers, including a provision permitting each nondominant carrier to express rates in the manner of such carrier's choosing, including as a reasonable range of rates.[16/]

SBC's predecessor-in-interest, Southwestern Bell Corporation, and others sought review by the U.S. Court of Appeals for the District of Columbia Circuit of the Nondominant Filing Order, challenging both the distinction between dominant and nondominant carriers and the Commission rule permitting nondominant carriers to file tariffs expressing rates as within ranges. Although the appellate court vacated the entire Nondominant Filing Order, it specifically invalidated only that portion of the Order that permitted carriers to express their tariffed rates as a range of rates, reasoning that under the Supreme Court's decision in MCI v. AT&T, *supra*, note 13, the Commission's authority to modify Section 203's tariff filing requirements was limited, and did not include permitting carriers to file rates expressed in ranges.[17/] Again,

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[14/] 8 F.C.C. Rcd. 1395 (1993.)

[15/] Tariff Filing Requirements for Nondominant Common Carriers, 8 F.C.C. Rcd. 6752 (1993).

[16/] 47 C.F.R. § 61.22(b).

[17/] Southwestern Bell Corporation v. FCC, 43 F.3d 1515 (D.C. Cir. 1995) ("Southwestern Bell") at 1520, 1526. The Court noted that Section 203(a) requires all common carriers to file "'schedules showing all charges,'" thus requiring more specificity than would be provided by expressing rates merely in terms of a range. 43 F.3d at 1520.

the Court did not rule on the propriety of the Commission's distinction between dominant and nondominant carriers or its different regulatory treatment of such carriers, other than non-dominant carrier tariffing of rates expressed in ranges.

The Commission responded to the Court's vacating of the range-of-rates portion of the Nondominant Filing Order by issuing the Order, in which it reinstated the streamlined tariff filing requirements for nondominant carriers set forth in the Nondominant Carrier but eliminated the range-of-rates provision. Order at ¶¶ 2, 21. In issuing the Order, the Commission explained that it had considered the "entire extensive record already assembled for the Nondominant Filing NPRM and Nondominant Filing Order," and it found that the existing record supported the decision to reinstate the tariff filing rules not invalidated by the Court of Appeals. Order at ¶ 8. The Commission concluded that there was "neither a policy reason nor a legal requirement" that it supplement the record before issuing the Order. *Id.*

B. SBC's Petition.

In its Petition, SBC claims that the Commission should reconsider its Order for two reasons: First, SBC alleges that the Commission improperly failed to explain in the Order why it did not reassess the classification of carriers as dominant or nondominant, or to consider applying to dominant carriers the tariff filing requirements it imposed on non-dominant carriers. Petition at 2, 6-7. Second, it alleges that, following the Court of Appeal's rejection of the range-of-rates rule, the Commission was obliged either to reopen the record assembled in connection with the Nondominant Filing Order or to explain why additional public comment was not required. Petition at 10. The Commission was not permitted, SBC

asserts, simply to issue an Order addressing the Court's concerns in reliance on the existing record, as it did. *Id.*

II.

ARGUMENT

A. SBC Is Attempting to Seek Reconsideration of the Commission's *Competitive Carrier Services* Orders; Not an Order in this Docket.

SBC seeks reconsideration of the Order on the grounds that the Commission should have reconsidered in the Order the well established classification of carriers as either dominant or nondominant. According to SBC, "this proceeding calls into question whether blanket dominant carrier classifications retain any validity" because competitive conditions now exist that no longer justify the distinction between dominant and nondominant carriers. Petition at 7-8.

In seeking reconsideration of the dominant/nondominant classification of carriers -- a matter which the Commission declined to revisit in the Nondominant Filing Order[18/] and which it did not re-evaluate in the Order of which SBC seeks reconsideration -- SBC's *real* objection is not to the Order, but to the Competitive Carrier Services proceeding, in which the dominant/nondominant classification and of carriers was evaluated at length and adopted. Accordingly, SBC is inappropriately attempting to seek reconsideration of long-settled issues decided in another proceeding. It is not seeking reconsideration of a matter which was decided in the Order at issue or in earlier phases of this docket. Thus, its Petition for Reconsideration should be denied insofar as it seeks to revisit the classification of carriers as dominant or non-

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[18/] 8 F.C.C. Rcd. at 6754.

dominant, a matter decided years ago in the Competitive Carrier Services rulemaking and not in the Order or docket at issue.

This is not the time, and a Petition for Reconsideration is not the vehicle, to request a fresh look at the dominant/nondominant classification of carriers. If it is unwilling to wait for these issues to be resolved in pending rulemaking proceedings (discussed in Section D, below), SBC should file a Petition for Rulemaking, not a Petition for Reconsideration of issues that the Commission did not decide in the challenged Order.

B. The Commission's Decision Not to Revisit the Classification of Carriers as Dominant or Nondominant in the *Order* Was a Reasonable Exercise of Agency Discretion.

As noted above, the Commission did not analyze the dominant/nondominant classification in the Order. In the Nondominant Filing Order the Commission explained that such issue was not within the scope of this proceeding, and that it would not expand the proceeding to encompass the issue.[19/] The Commission's decision to exclude reconsideration of the dominant/nondominant classification from this proceeding was a reasonable exercise of agency discretion. Indeed, SBC itself admits that "the Commission need not address in one proceeding all of the *different* issues that relate to a particular regulatory problem." Petition at 6.[20/]

In Western Union International, Inc. v. FCC,[21/] the Court of Appeals rejected an argument, similar to SBC's, that the Commission was obliged to reconsider its entire regulatory

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19/ 8 F.C.C. Rcd. at 6754.

20/ *Citing* Mobil Oil Exploration & Producing S.E., Inc., v. United Gas Distribution Cos., 498 U.S. 211, 230 (1991); Associated Gas Distributors v. FERC, 824 F.2d 981, 1038-39 (D.C. Cir. 1987).

21/ 804 F.2d 1280 (D.C. Cir. 1986).

policy for international record carriers when it reconsidered discrete aspects of the policy in response to a remand from the Court. The Court wrote:[22/]

> We did not . . . require the FCC to resolve these policy issues in a single proceeding. . . . On the contrary, our directive implicitly recognized, as we must, that the FCC enjoys discretion to order its own docket. It is not for us to sit as a super-board of directors and instruct administrative agencies how to go about their business.

As in Western Union, the Court of Appeals in Southwestern Bell[23/] did not require the Commission to reconsider its entire regulatory system for dominant and nondominant carriers; instead, it specifically invalidated only the range-of- rates tariffing provision for nondominant carriers. As in Western Union, the Commission exercised its discretion in deciding to address only the range-of-rates portion of the Nondominant Filing Order -- and not the entire regulatory system for dominant and nondominant carriers -- in response to the Court of Appeals' rejection of that discrete regulation. Its judgment in that regard was reasonable and should not be reconsidered.

The decision by an administrative agency not to include certain issues in the scope of a rulemaking proceeding is entitled to a high degree of deference, and "is to be overturned 'only in the rarest and most compelling of circumstances,' . . . which have primarily involved 'plain errors of law, suggesting that the agency has been blind to the source of its delegated power.'"[24/] SBC should therefore support its request for reconsideration with a compelling

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[22/] 804 F.2d at 1288 (citations omitted).

[23/] *Supra,* note 17.

[24/] American Horse Protection Ass'n v. Lyng, 812 F.2d 1, 4-5 (D.C. Cir. 1987) (quoting WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C. Cir. 1981).

showing that the Commission's failure to revisit the dominant/nondominant classification in the Order was in error.

This SBC can not do; its entire claim that the dominant/nondominant classification of carriers should be revisited is based on conclusory, self-serving and simply incorrect claims that the local exchange/exchange access services markets are competitive. *E.g.,* Petition at 4. Not only does SBC blatantly mischaracterize Commission statements in this regard, but it dismisses the fact that the Commission is considering the competitiveness of local exchange carrier ("LEC") services in the LEC Price Caps Performance Review docket, CC Docket 94-1.[25/]

SBC claims that the Commission found in the Nondominant Filing NPRM and the Nondominant Filing Order that "local exchange carriers face 'significant competition.'" Petition at 4. Neither the citations provided by SBC, nor any other Commission conclusions in this proceeding, support SBC's claim. Indeed, such a finding by the Commission would be surprising in light of recent Commission statements recognizing the paucity of competition in local exchange/exchange access services.

Less than a year ago, the Commission observed that, "[b]ecause the LECs appear to retain substantial market power in providing local exchange and access services, regulation continues to be needed to achieve the goals of the Communications Act, and to increase consumer welfare."[26/] As to the presence of competition in LEC-controlled markets, the Commission stated, "While local access competition has begun to develop, the LECs continue to

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[25/] LEC Price Caps Performance Review, CC Docket 94-1, Second Further Notice of Proposed Rulemaking, FCC 95-393 (released September 20, 1995).

[26/] Price Cap Performance Review for Local Exchange Carriers (First Report and Order), 10 F.C.C. Rcd. 8961 (released April 7, 1995) ("LEC First Report and Order") at 9002, ¶ 92.

exercise a substantial degree of market power in virtually every part of the country, and continue to control bottleneck facilities."[27/] Noting that it would re-visit in the future the issue of competition facing the LECs, the Commission concluded that "[t]he record in this proceeding does not support a finding that competition for LEC services is sufficiently widespread to constrain the pricing practices of LECs for new services."[28/]

Similarly, in its Spring, 1995 report entitled "Common Carrier Competition," the Common Carrier Bureau acknowledged that the LECs' collective share of access revenues (97%) was "roughly comparable to the Bell System's share of toll revenues in 1981."[29/] The Bureau concluded that "it may be argued that the development of competition in local services is roughly a dozen years behind the development of competition in long distance."[30/]

Thus, the factual circumstances on which SBC relies as the justification for reconsideration of the dominant/nondominant classification -- the alleged presence of significant competition in local exchange/exchange access services -- are simply nonexistent. Absent compelling evidence that circumstances warrant revisiting the dominant/nondominant classification of local carriers, the Commission's decision to exclude consideration of that issue from this proceeding is entitled to deference, and SBC's Petition for Reconsideration should be denied.

27/ LEC First Report and Order, *supra,* note 26, 10 F.C.C. Rcd. at 9122, ¶ 368.

28/ LEC First Report and Order, 10 F.C.C. Rcd. at 9143, ¶ 418.

29/ Common Carrier Bureau, "Common Carrier Competition" (Spring, 1995) ("Spring Competition Report") at 5.

30/ "Spring Competition Report," *supra,* note 29, at 5.

C. Following the *Southwestern Bell* Decision, The Commission Was Not Obligated to Reopen the Record Assembled in this Proceeding.

SBC asserts that the Commission was required by the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"), to reopen the record assembled in this proceeding after the Court of Appeals vacated the Nondominant Filing Order. Petition at 9. As SBC itself notes, however, the same Court held in Mobil Oil Corp. v. EPA[31/] that, when a reviewing court vacates a rule, the agency reconsidering the rule is not required to "'start from scratch' and initiate a new round of notice and comment proceedings . . . . If the original record is still fresh, a new round of notice and comment might be unnecessary."

The Court explained in this regard that the APA provides for a "good cause" exception to the general rule requiring notice of a proposed rule and opportunity for comment, where the agency makes a finding "'that notice and public procedure thereon are . . . unnecessary.'"[32/] If the agency seeks to avail itself of this exception, it must make a finding that the record is still fresh, which finding is supported in the record.[33/]

In this proceeding, the Commission specifically found in the Order that "the existing record supports our decision to reinstate those tariff filing rules which were not considered by the court," and it concluded that it was unnecessary to supplement the record before re-promulgating the rules without the range-of-rates provision. Order at ¶ 8. The Commission's finding that the existing record in this docket was sufficient to support its conclusions in the

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31/ 35 F.3d 579, 584 (D.C. Cir. 1994) ("Mobil Oil")(quoted in Petition at 9).

32/ Mobil Oil Corp. v. EPA, *supra*, note 31, 35 F.3d at 584 (citing 5 U.S.C. § 553(b)(3)(B)).

33/ Mobil Oil, *supra*, note 31, 35 F.3d at 584. In Mobil Oil, the Court invalidated the EPA's re-promulgation of a rule which the Court had previously vacated because the EPA "neither initiated a new rulemaking nor invoked the APA's good cause exception in the record." *Id.* at 585.

Order was reasonable, given the facts that this proceeding was initiated only 31 months before the Order was released, and that the Nondominant Filing Order, which was reinstated in the Order except for the range-of-rates provision, had been released only 25 months before the Order was released.

Such timing is in sharp contrast to that of the Civil Aeronautics Board ("CAB") in Action on Smoking and Health v. C.A.B.,[34/] on which SBC relies, where the Court of Appeals vacated a rule re-promulgated by the CAB following the Court's vacating and remanding a similar rule. The CAB re-promulgated the revised rule without initiating a notice-and-comment rulemaking proceeding, relying only on a record that was the culmination of a rulemaking proceeding begun *seven years* before the revised rule was promulgated.[35/] The Court reasoned that "[a]lthough the [APA] does not establish a 'useful life' for a notice and comment record, clearly the life of such a record is not infinite."[36/]

In light of the relatively short life of the record in this proceeding and the Commission's specific finding in the Order that it was unnecessary to supplement the existing record, the Commission has satisfied the requirement for invoking the "good cause" exception to the notice-and-comment requirements of the APA and its decision not to reopen the record was therefore appropriate.

[34/] 713 F.2d 795 (D.C. Cir. 1983) ("ASH v. C.A.B.").

[35/] ASH v. C.A.B, *supra*, note 34, 765 F.2d at 800.

[36/] 765 F.2d at 800.

D. Relaxed Tariff Filing Requirements for LECs, as Sought by SBC, Are Presently Being Considered in the *LEC Price Caps Pricing Flexibility* Proceeding.

SBC's Petition should also be rejected because issues similar to those it raises with respect to the classification of carriers as dominant or nondominant and with respect to the tariff filing requirements applicable to carriers now classified as dominant are being considered in the LEC Price Caps Performance Review proceeding.[37/] Indeed, SBC itself acknowledges this fact, but it argues that this alone should not preclude reconsideration of the Order because "[t]he Commission's decision to address 'related, yet discrete, issues' . . . in a separate rule-making is not an acceptable substitute for considering all the major aspects of the issue that the Commission determined to address in this docket." Petition at 4, 6.

SBC is wrong on two counts. First, the purpose of this docket was *not* to revisit the dominant/nondominant classification system nor to consider new regulatory requirements for dominant carriers, but merely to promulgate tariff filing requirements for nondominant carriers in response to judicial rejection of the forbearance policy for such carriers.[38/] As noted previously, in reviewing Commission regulation of nondominant carriers under the Competitive Carrier Services Orders, the courts have never invalidated the basic classification of carriers as dominant or nondominant or the wisdom of generally according nondominant carriers more relaxed regulatory treatment than dominant carriers.

[37/] *Supra,* note 25. Similar issues will be addressed with respect to all interexchange carriers in a rulemaking proceeding to be initiated soon. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (released October 23, 1995) at ¶ 2.

[38/] Nondominant Filing NPRM, *supra*, note 14, 8 F.C.C. Rcd. at 1396.

Second, as SBC itself concedes, "the Commission need not address in one proceeding all of the *different* issues that relate to a particular regulatory problem." Petition at 6.[39/] Commission consideration in this proceeding of the basic dominant/nondominant classification of carriers or of regulation of dominant carriers while it was establishing tariffing requirements for nondominant carriers would have been inappropriate, unwarranted by the decisions of reviewing courts, and a waste of the Commission's resources.

Accordingly, since the Commission is considering, or soon will consider, the issues raised by SBC in other proceedings, SBC's claim that such issues should be considered here should be rejected.

[39/] *See supra* note 20.

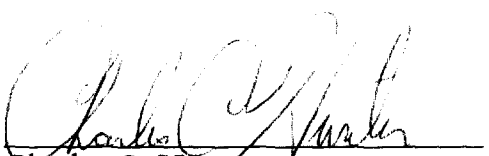
III.

CONCLUSION

For the foregoing reasons, the Telecommunications Resellers Association respectfully requests that SBC's Petition for Reconsideration be dismissed.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

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